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11 Attorneys for Defendant Fifth  
Generation, Inc.

13 UNITED STATES DISTRICT COURT  
14 SOUTHERN DISTRICT OF CALIFORNIA  
15

16 GARY HOFMANN,

17 Plaintiff,

18 v.

19 FIFTH GENERATION, INC., a Texas  
20 corporation; and DOES 1 through 100,  
inclusive,

21 Defendants.  
22  
23  
24

CASE NO.: '14CV2569 JM JLB

NOTICE OF REMOVAL BY  
DEFENDANT FIFTH  
GENERATION, INC. PURSUANT  
TO 28 U.S.C. § 1332(d)(2)

Action filed: Sept. 30, 2014  
Trial date: none set

PLEASE TAKE NOTICE that Defendant Fifth Generation, Inc. (“Defendant”) hereby removes the above-captioned action, *Hofmann v. Fifth Generation, Inc.*, Case No. 37-2014-00031150-CU-NP-CTL (the “Action”) from the California Superior Court for the County of San Diego to the United States District Court for the Southern District of California pursuant to 28 U.S.C. §§ 1332(d), 1441(a), and 1446(b) on the grounds articulated below. Defendant provides this “short and plain statement of the grounds for removal” pursuant to 28 U.S.C. § 1446(a). In the event that the Court requires that Defendant prove the facts alleged in this pleading, or to otherwise establish jurisdiction, Defendant is prepared to do so.<sup>1</sup>

### **STATEMENT OF JURISDICTION**

1. This Court has original jurisdiction over this action under the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d). In relevant part, CAFA grants District Courts original jurisdiction over civil class actions filed under federal or state law in which any member of a class of plaintiffs is a citizen of a state different from any defendant and where the amount in controversy for the putative

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<sup>1</sup> If a removing party’s “allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, [then the removing party] must support them by competent proof.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992) (quoting *McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189, 56 S. Ct. 780 (1936)); *see also Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) (“The removing party, as the proponent of federal jurisdiction, bears the burden of describing how the controversy exceeds \$5 million ... This is a pleading requirement, not a demand for proof.”); *McNutt*, 298 U.S. at 189 (defendants must put forth competent proof “[i]f his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner”). In the response to such a challenge, the District Court may consider the “contents of the removal petition,” as well as any “supplemental evidence later proffered by the removing defendant.” *Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199, 1205 (E.D. Cal. 2008) (quoting *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004) and citing *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002)); *see also Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995) (same); *Singer v. State Farm Mut. Auto Ins.*, 116 F.3d 373, 374 (9th Cir. 1997) (in response to motion to remand, “defense counsel submitted declarations to show that the amount in controversy exceeded \$50,000”).

1 class members in the aggregate exceeds the sum or value of \$5,000,000, exclusive of  
2 interest and costs. As set forth below, this case meets all of CAFA's requirements for  
3 removal and is timely and properly removed by the filing of this Notice. The sole  
4 named defendant, Fifth Generation, Inc., initiates, and consents to, removal.

### 5 VENUE

6 2. The Action was filed in the Superior Court of the State of California for  
7 the County of San Diego. Therefore, venue properly lies in the United States District  
8 Court for the Southern District of California pursuant to 28 U.S.C. §§ 84(a), 1391(a),  
9 and 1441(a).

### 10 PLEADINGS, PROCESS, AND ORDERS

11 3. On or about September 15, 2014, plaintiff Gary Hofmann ("Plaintiff"),  
12 on behalf of himself and others similarly situated, initiated the Action by filing a  
13 complaint in the Superior Court for the State of California, San Diego County. The  
14 original complaint wrongly named "Fifth Dimension, Inc." as the defendant.

15 4. On or about September 25, 2014, Plaintiff filed a document with the  
16 Superior Court seeking to correct the name of the defendant at-issue.

17 5. Prior to serving Defendant with the Summons and Complaint, on or  
18 about September 30, 2014, Plaintiff filed a First Amended Complaint (hereafter  
19 "Complaint") with the Superior Court. According to the Complaint, Plaintiff and the  
20 members of the nationwide putative class he purports to represent are retail  
21 purchasers of Tito's Handmade Vodka, a product manufactured by Defendant.  
22 (Exhibit A, Complaint ¶¶ 1, 19.)

23 6. Plaintiff contends he served Defendant with the Summons and  
24 Complaint on October 2, 2014.

25 7. In accordance with 28 U.S.C. §1446(a), a true and correct copy of the  
26 Summons and Complaint (together with the civil case cover sheet, affidavit of venue,  
27 ADR information packet, notice of case assignment, e-filing notice, and General  
28

1 Order of the Presiding Department No. 051414) filed in the San Diego Superior  
2 Court and served on Defendant is attached hereto as Exhibit A.

3 8. The Complaint alleges four causes of action for: (1) violation of  
4 California's Unfair Competition Law, Business and Professions Code §§ 17200, et  
5 seq.; (2) violation of California's False Advertising Law, Business and Professions  
6 Code §§ 17500 et seq.; (3) violation of the Consumers Legal Remedies Act, Civil  
7 Code §§ 1750 et seq.; and (4) negligent misrepresentation.

8 **SERVICE ON THE STATE COURT**

9 9. Pursuant to 28 U.S.C. § 1446(d), contemporaneously with the filing of  
10 this Notice of Removal in the United States District Court for the Southern District of  
11 California, written notice of such filing will be given by the undersigned to Plaintiff's  
12 counsel of record, and a copy of the Notice of Removal will be filed with the Clerk of  
13 the San Diego County Superior Court.

14 **TIMELINESS OF THE REMOVAL**

15 10. This removal is timely because this Notice is being filed within 30 days  
16 after the receipt by Defendant, through service of process, of a copy of the Summons  
17 and Complaint. *See* 28 U.S.C. § 1446(b)(1); *Roth v. CHA Hollywood Med. Center,*  
18 *L.P.*, 720 F.3d 1121, 1125 (9th Cir. 2013).

19 **ORIGINAL JURISDICTION PURSUANT TO CAFA**

20 11. This Court has jurisdiction over this case under CAFA, 28 U.S.C.  
21 § 1332(d), and this case may be removed pursuant to the provisions of 28 U.S.C.  
22 § 1441(a), in that it is a civil putative class action and: (1) the proposed class  
23 contains at least 100 members; (2) no defendant is a state, state official, or other  
24 governmental entity; (3) the total amount in controversy for all class members  
25 exceeds \$5 million, as stipulated by the named plaintiff; and, (4) there is diversity  
26 between at least one class member—*e.g.*, the named plaintiff, who is a citizen of the  
27 State of California—and the sole defendant, which is a citizen of the State of Texas.

1 CAFA authorizes removal of such actions in accordance with 28 U.S.C. § 1446. As  
 2 discussed below, this case meets each CAFA requirement for removal.

3 ***The Proposed Class Contains At Least 100 Members***

4 12. Plaintiff's class consists of all persons who purchased Tito's Handmade  
 5 Vodka in the United States during the last four years. (Exhibit A, Complaint ¶¶ 10,  
 6 19.) In the past four years, more than 100,000 cases of Tito's Handmade Vodka have  
 7 been sold in the United States, which corresponds to more than 1 million bottles of  
 8 product. (See Declaration of Katherine White ("White Decl."), ¶ 4.) Therefore, it  
 9 appears that there are well over 100 retail purchasers who would comprise the  
 10 putative class since, if the class comprised of 100 or less persons, each putative class  
 11 member would have had to purchase on average over 10,000 bottles of product. See  
 12 *Mullins v. Harry's Mobile Homes, Inc.*, 861 F. Supp. 22, 24 (S.D.W.V. 1994) (stating  
 13 that when analyzing the propriety of removal: "The court ... is not required to leave  
 14 its common sense behind."); see also *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d  
 15 744, 770 (11th Cir. 2010) ("[V]iewing facts through the lens of common sense is not  
 16 star gazing.").

17 ***Defendant Is Not A Governmental Entity***

18 13. Defendant is not a state, state official, or other governmental entity.

19 ***A Putative Class Member's State of Citizenship Is Diverse From Defendant's***  
 20 ***Citizenship***

21 14. CAFA's diversity requirement is satisfied when at least one plaintiff is a  
 22 citizen of a state in which the defendant is not a citizen. 28 U.S.C. §§ 1332(d)(2)(A),  
 23 1453. Here, Plaintiff alleges that he resides in San Diego, California. (Exhibit A,  
 24 Complaint ¶ 2.) Further, Plaintiff has stipulated, through counsel, that he is a  
 25 California citizen.

26 15. For diversity purposes, a corporation "shall be deemed to be a citizen of  
 27 every State and foreign state by which it has been incorporated and of the State or  
 28 foreign state where it has its principal place of business...." 28 U.S.C. § 1332(c)(1);

1 *see Hertz Corp. v. Friend*, 559 U.S. 77, 80-81, 130 S. Ct. 1181, 1185-86 (2010).  
 2 Here, Defendant was, at the time of the filing of this action, and remains, a Texas  
 3 corporation with its corporate headquarters in Austin, Texas. (Exhibit A, Complaint  
 4 ¶ 3; *see* White Decl., ¶ 3.) All of its administrative and executive functions are  
 5 performed at those headquarters. (White Decl., ¶ 3.) And all of Defendant's  
 6 production facilities are located in Austin, Texas. Texas is therefore Defendant's  
 7 principal place of business. (*Id.*) Thus, Defendant is a citizen of Texas and is not a  
 8 citizen of the State of California.

9 16. The "DOE" defendants named in Plaintiff's Complaint are fictitious.  
 10 (Exhibit A, Complaint ¶ 4.) The Complaint does not set forth the identity or status of  
 11 these fictitious defendants, nor does it set forth any charging allegation against any  
 12 fictitious defendants. The citizenship of such fictitious defendants sued under  
 13 fictitious names must be disregarded for the purposes of determining diversity  
 14 jurisdiction and cannot destroy the diversity of citizenship between the parties in this  
 15 action. *See* 28 U.S.C. § 1441(b)(1); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686,  
 16 690-91 (9th Cir. 1998).

17 17. In sum, because Plaintiff is a citizen of California, and Defendant is a  
 18 citizen of Texas, at least one putative class member is diverse from the Defendant,  
 19 and thus CAFA's minimal diversity requirement is met.

20 ***The Amount In Controversy On Class Claims Exceeds \$5,000,000***

21 18. Though Defendant concedes no liability on Plaintiff's claims, assuming  
 22 Plaintiff's allegations to be true, Plaintiff's class claims place in controversy a sum  
 23 greater than \$5,000,000. Specifically, Plaintiff alleges that he and the putative class  
 24 members (in a putative nationwide class), among other things, are entitled to recover  
 25 from Defendant "a refund of the monies Class Members paid to purchase the  
 26 offending Vodka plus sales taxes." (Exhibit A, Complaint, Prayer ¶ 6.) Plaintiff  
 27 further alleges the relevant statutory time period is four years. (Exhibit A, Complaint  
 28 ¶ 10.) Accordingly, because the total nationwide sales for Tito's Handmade Vodka



1 exceeds \$5,000,000 (*see* White Decl., ¶ 5), the amount-in-controversy requirement is  
2 satisfied here. *See Watkins v. Vital Pharm., Inc.*, 720 F.3d 1179, 1181 (9th Cir.  
3 2013). Plaintiff has also stipulated, through counsel, that his class claims place in  
4 controversy a sum greater than \$5,000,000.

5 19. On top of this, Plaintiff and his putative class also seeks to recover  
6 attorneys' fees, costs, and interest. (Exhibit A, Complaint, Prayer ¶¶ 8-10.) None of  
7 these additional recoveries are included in the foregoing calculation.

8 20. At issue "is what amount is put 'in controversy' by the plaintiff's  
9 complaint, not what a defendant will actually owe." *See Korn*, 536 F. Supp. 2d at  
10 1205 (quoting *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 986 (S.D.  
11 Cal.2005)). "In measuring the amount in controversy, a court must assume that the  
12 allegations of the complaint are true and that a jury will return a verdict for the  
13 plaintiff on all claims made in the complaint." *Id.* at 1205 (citing *Kenneth Rothschild*  
14 *Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002).  
15 Further, defenses that a defendant may assert are not considered in assessing the  
16 amount placed in controversy. *See Riggins v. Riggins*, 415 F.2d 1259, 1262 (9th Cir.  
17 1969) ("None of these facts are disclosed by the complaint; the court must resolve  
18 them in determining the validity of the defense of the statute of limitations; and the  
19 possibility of such a defense being valid does not affect the jurisdiction of the district  
20 court to hear and determine the controversy"); *Hernandez v. Towne Park, Ltd.*, No.  
21 CV 12-02972 MMM (JCGx), 2012 WL 2373372, \*10 (C.D. Cal. June 22, 2012)  
22 ("[T]he fact that [defendant] may assert a limitations defense does not limit the relief  
23 sought in the complaint."); *Lara v. Trimac Transp. Svcs. (W.) Inc.*, No. CV 10-4280-  
24 GHK (JCx), 2010 WL 3119366, \*3 (C.D. Cal. Aug. 6, 2010) ("affirmative defenses  
25 ... may not be invoked to demonstrate that the amount in controversy is actually less  
26 than the jurisdictional minimums.").

27 21. Defendant denies that it has any liability to Plaintiff or to the putative  
28 class that he seeks to represent, and denies that Plaintiff or the putative class

1 members are entitled to recover any damages, punitive damages, injunctive relief,  
2 attorney fees, or the other relief requested in the Complaint. Defendant also submits  
3 that this action does not satisfy the requirements for class certification under Fed. R.  
4 Civ. P. 23. Nevertheless, amount in controversy is not a merits issue, but, instead is  
5 measured simply by the nominal value of the claims asserted in the Complaint. Here,  
6 that value exceeds \$5 million, based upon nationwide sales of Tito's Handmade  
7 Vodka over the past few years.

8 22. Removing Defendant hereby reserves the right to amend this notice of  
9 removal.

10  
11 WHEREFORE, Defendant removes the Action from the Superior Court of the  
12 State of California, County of San Diego, to this Court.

13 DATED: October 28, 2014

Respectfully submitted,

14 COOLEY LLP

15  
16 /s/ Michelle C. Doolin  
17 Attorneys for Defendant Fifth  
18 Generation, Inc.  
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